CASE NO. 81-6782

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

MICHAEL MACK, Petitioner,

v.

THE STATE OF OKLAHOMA, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court's decision in Carter v. Kentucky, requiring instruction of trial juries regarding the privilege against self-incrimination, be given full retroactive effect?

2. If not, should the Carter decision be applied in cases which were pending on direct appeal when the Carter decision was rendered?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE	2
STATEMENT OF THE CASE	3
HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW	4
REASONS FOR GRANTING THE WRIT	5
1. The Decision Below, Which Denies Retroactive Effect to Carter v. Kentucky, Is Inconsistent With the Decisions of Other State Appellate Courts.	5
2. The Decision Below Is Inconsistent With the Principles of Retroactivity Established by This Court.	7
CONCLUSION	10
APPENDIX A	
Opinion of the Court of Criminal Appeals of Oklahoma	
APPENDIX B	
Petition for Rehearing in the Court of Criminal Appeals of Oklahoma	
APPENDIX C	
Order of the Court of Criminal Appeals of Oklahoma Denying Petition for Rehearing	

TABLE OF AUTHORITIES

Cases	Page
Brown v. Louisiana, 447 U.S. 323 (1980)	10
Bruno v. United States, 308 U.S. 287 (1939)	7
Carter v. Kentucky, 450 U.S. 288 (1981)	3 et seq.
Chapman v. California, 386 U.S. 18 (1967)	6
Chevron Oil Co. v. Huson, 404 U.S. 97 (1971)	7, 8
Griffin v. California, 380 U.S. 609 (1965)	9
Hamling v. United States, 418 U.S. 87 (1974)	9
Hankerson v. North Carolina, 432 U.S. 233 (1977)	10
Lakeside v. Oregon, 435 U.S. 333 (1978)	8
Mosley v. State, 402 So. 2d 559 (Fla. App. 1981)	5, 6
O'Connor v. Ohio, 385 U.S. 92 (1966)	9
People v. Crawford, 632 P.2d 626 (Colo. App. 1981)	5, 6
People v. Silver, 121 Cal. App. 3d 533, 175 Cal. Rptr. 483 (1981)	6
Richardson v. State, 402 So. 2d 848 (Miss. 1981)	6
Stovall v. Denno, 388 U.S. 293 (1967)	9n
Taylor v. Kentucky, 436 U.S. 478 (1978)	8
Tehan v. United States ex rel. Shott, 382 U.S. 406 (1966)	9

Cases	Page
United States v. Ross, 655 F.2d 1159 (D.C. Cir. 1981), cert. granted, 102 S.Ct. 386 (1982)	9

Statutes and Constitutional Provisions

United States Constitution	
Amendment V	2 et seq.
Amendment XIV	2
United States Code	
28 U.S.C. §1257(3)	1
Oklahoma Statutes	
21 Okla. Stat. § 801 (Supp. 1976)	3

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THE STATE OF OKLAHOMA, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA

The Petitioner, Michael Mack, requests that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of Oklahoma entered in this case on March 2, 1982.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Oklahoma, which is reported at 641 P.2d 1122 (Okla. Cr. 1982), appears in Appendix A. No opinions were rendered by the trial court.

JURISDICTION

The Petitioner is seeking a writ of certiorari to the Court of Criminal Appeals of Oklahoma in order to review a judgment entered on March 2, 1982. A petition for rehearing was denied by the Court of Criminal Appeals on March 25, 1982. Jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

United States Constitution, amendment V, provides in pertinent part:

> No person ... shall be compelled in any criminal case to be a witness against himself ... .

United States Constitution, amendment XIV, section 1, provides, in pertinent part:

> ... nor shall any State deprive any person of life, liberty or property, without due process of law ... .

STATEMENT OF THE CASE

The Petitioner was charged in an Oklahoma state trial court with Robbery with Firearms, 21 Okla. Stat. § 801 (Supp. 1976), in connection with the alleged armed robbery of a Tulsa woman at a car wash (R. 5-6).* A trial jury found the Petitioner guilty; during a separate recidivist sentencing proceeding, he was sentenced by the jury to sixty (60) years imprisonment (R. 23-24, 49).

The Petitioner did not testify at his trial, which was held in December of 1979. The Petitioner's trial counsel requested the trial court to deliver a jury instruction cautioning the jury against drawing any adverse inference from the Petitioner's failure to testify. The requested instruction was not delivered (Tr. 129; R. 25-34).

The Petitioner appealed his conviction to the Court of Criminal Appeals of Oklahoma. While the appeal was pending, this Court announced its decision in Carter v. Kentucky, 450 U.S. 288 (1981), holding that refusal to deliver a jury instruction cautioning against adverse inferences from the failure to testify violated the Fifth Amendment. The Carter decision was announced on March 9, 1981.

In ruling on the Petitioner's contention that refusal to deliver the requested cautionary instruction violated the Fifth Amendment, the Court of Criminal Appeals stated: "Although we are bound by the decision of the Supreme Court, they did not

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* The record in the Court of Criminal Appeals of Oklahoma comprises a bound record, consisting of instruments filed in the trial court (hereafter referred to as R.), and a trial transcript (hereafter referred to as Tr.).

hold that the ruling in Carter was retroactive, and in light of our previous rulings, we hold that the decision in Carter, should be applied prospectively only" (Appendix A at 3). The Petitioner's conviction was affirmed.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The federal questions were raised in the trial court during an instructions conference between the court and counsel. The Petitioner's counsel stated:

> We would ask that the Court give the stock instruction with regard to the fact that the jury is not to draw any inference from the fact that the Defendant himself has not testified (Tr. 129).

The trial judge did not rule on this request, but did not deliver the requested instruction (R. 25-34).

On appeal to the Court of Criminal Appeals of Oklahoma, the federal questions were raised in Assignment 14 of the Amended Petition in Error and in Proposition I of the Brief of Appellant ("The trial court erred in refusing defendant's request for instruction 'that the jury is not to draw any inference from the fact that the defendant has not testified'"). The Brief stated: "Such an instruction is required by the United States Constitution: failure to give the instruction was in violation of Mr. Mack's fifth amendment rights" (Brief of Appellant at 7).

The Court of Criminal Appeals addressed the Petitioner's contention that the no-inference instruction "is required by the United States Constitution, when requested" (Appendix A at 2). The Court of Criminal Appeals held that this Court's decision in

Carter v. Kentucky was not retroactive, and affirmed the Petitioner's conviction (Appendix A at 3). A petition for rehearing was denied (Appendix B and C).

REASONS FOR GRANTING THE WRIT

1. The Decision Below, Which Denies Retroactive Effect to Carter v. Kentucky, Is Inconsistent with Decisions of Other State Appellate Courts.

In the decision below, the Court of Criminal Appeals of Oklahoma held that this Court's decision in Carter v. Kentucky, 450 U.S. 288 (1981) would not be applied in the Petitioner's case. The Petitioner's trial preceded the Carter decision; his case was pending on direct appeal when the Carter decision was announced. Several other state appellate courts have been presented with the same situation: all of these courts have reached conclusions inconsistent with that of the Court of Criminal Appeals of Oklahoma.

In People v. Crawford, 632 P.2d 626 (Colo. App. 1981) and Mosley v. State, 402 So. 2d 559 (Fla. App. 1981), state appellate courts reversed convictions in cases in which a trial court had refused to deliver a no-inference instruction, relying on the Carter decision. Although neither opinion specifies the date of trial, both cases were decided shortly after the Carter decision: presumably the trials in both cases antedated Carter.* Neither court expressly addressed the retroactivity issue.

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* Crawford was decided less than 2 months after the Carter decision. Mosley was decided 5½ months after the Carter decision.

In Richardson v. State, 402 So. 2d 848, 851-52 (Miss. 1981) and People v. Silver, 121 Cal. App. 3d 533, 175 Cal. Rptr. 483, 493-94 (1981), two other state appellate courts considered refusals to deliver no-inference instructions. The Silver opinion indicates that the defendant was tried before the Carter decision. The Richardson opinion does not reveal the defendant's trial date; however, since the Richardson opinion was handed down shortly (5½ months) after the decision in Carter, the trial date presumably antedated the Carter decision. Both the Richardson and Silver courts acknowledged the applicability of Carter, but held that any error was harmless under the constitutional harmless error doctrine of Chapman v. California, 386 U.S. 18 (1967). Neither court expressly addressed the retroactivity question.

The Crawford, Mosley, Richardson and Silver decisions are all based on the implicit assumption that this Court's decision in Carter v. Kentucky should be accorded retroactive effect, at least as to cases pending on direct review when the Carter decision was announced. As such, these decisions are inconsistent with the conclusion reached by the Court of Criminal Appeals of Oklahoma in this case.

The decision below and the Crawford, Mosley, Richardson, and Silver decisions establish a conflict which should be resolved by this Court. The number of cases (at least 5) in which the issue has thus far been presented indicates that the retroactitivy of the Carter decision is a recurring question having practical significance in a number of states. A writ of certiorari should be granted to review the disposition of this issue by the Court of Criminal Appeals of Oklahoma.

2. The Decision Below Is Inconsistent With the Principles of Retroactivity Established by This Court.

The question raised by the decision of the Court of Criminal Appeals of Oklahoma is a significant one, as is confirmed by the number of courts which have been presented with the question, and by the (partially) divergent answers which have been provided. Furthermore, the disposition of this question by the Court of Criminal Appeals is not in accord with the retroactivity principles which have been established by this Court.

In Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971), this Court stated that, in order for one of its decisions to be limited to prospective effect, the decision "must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied ... or by deciding an issue of first impression whose resolution was not clearly foreshadowed." The Petitioner submits that the result in Carter v. Kentucky was "clearly foreshadowed" both by this Court's earlier decisions and by the weight of authority across the nation; the Carter decision is therefore entitled to full retroactive effect.

The decision in Carter did not involve the overruling of any of this Court's precedents: indeed, on two prior occasions this Court had expressly left open the question of whether the Fifth Amendment required delivery of a requested no-inference instruction. See Carter v. Kentucky, 450 U.S. at 295. The weight of authority across the nation provided a significant clue as to how this question would be answered: delivery of a no-inference instruction, upon request, had been required in the federal courts since the decision in Bruno v. United States,

308 U.S. 287 (1939), and was likewise required, upon request, in a majority of the states. Indeed, the Court's opinion in Carter identified only five (5) states, including Oklahoma, which prohibited delivery of a no-inference instruction. 450 U.S. at 290 & n.2.

Further anticipation of the Carter decision was provided by two 1978 decisions of this Court: Lakeside v. Oregon, 435 U.S. 333 (1978), and Taylor v. Kentucky, 436 U.S. 478 (1978). In Lakeside, the Court found no constitutional error in delivery of a no-inference instruction over a defendant's objection. The Court noted that "[t]he very purpose of a jury charge is to flag the jurors' attention to concepts that must not be misunderstood, such as reasonable doubt and burden of proof. To instruct them in the meaning of the privilege against compulsory self-incrimination is no different." 435 U.S. at 340.

In Taylor, the Court held that a jury instruction on the presumption of innocence was constitutionally required; in view of the statement in Lakeside that instruction on the privilege against self-incrimination is "no different", it is submitted that Taylor and Lakeside left little doubt as to the conclusion to be reached in Carter: a no-inference instruction would be constitutionally required.

Since the Carter decision did not overrule any of this Court's prior decisions, and was "clearly foreshadowed" by earlier decisions of this Court, it was entitled to full retroactive effect, under Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). Since the result in Carter meets the threshhold requirement of "clear foreshadowing", it is unnecessary to address whether

Carter meets the Court's other criteria for prospective application.* See United States v. Ross, 655 F.2d 1159, 1189 (D.C. Cir. 1981) (Wilkey, J., dissenting), cert. granted, 102 S.Ct. 386 (1982).

Even if full retroactive effect were not to be accorded to Carter, this Court's decisions would still require that Carter be applied to the limited class of persons, including the Petitioner, whose convictions were not final when the Carter decision was announced. As the Court noted in Hamling v. United States, 418 U.S. 87, 102 (1974), "[o]ur prior decisions establish a general rule that a change in the law occurring after a relevant event in a case will be given effect while the case is on direct review."

The conclusion that Carter should be applied to cases pending on direct appeal when Carter was decided finds support in this Court's decision in Tehan v. United States ex rel. Shott, 382 U.S. 406, 409 & n.3 (1966). There, the Court stated that the rule of Griffin v. California, 380 U.S. 609 (1965), prohibiting prosecutorial comment on a defendant's failure to testify, would be applied to cases on direct review when the Griffin decision was announced. See O'Connor v. Ohio, 385 U.S. 92, 93 (1966). Since both Griffin and Carter enforced the same Fifth Amendment privilege against self-incrimination, it is submitted that Carter

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* In Stovall v. Denno, 388 U.S. 293 (1967), the Court prescribed three other factors to be considered in limiting the retroactive effect of a new decision: (1) the purpose of the new result; (2) the extent to which law enforcement officials may have relied on the previous law; and (3) the impact of retroactivity on the administration of justice.

should likewise be applied to cases pending on direct review when Carter was announced.

In one of this Court's most recent discussions of the retroactivity question, two members of the Court concluded that "new constitutional rules should apply retroactively 'in cases still pending on direct review ...'." Brown v. Louisiana, 447 U.S. 323, 337 (1980) (Powell, J., concurring). " ... [T]his approach is closer to the ideal of principled, evenhanded judicial review than is the traditional retroactivity doctrine." Hankerson v. North Carolina, 432 U.S. 233, 248 (1977) (Powell, J., concurring). Since the Petitioner's conviction was still pending on direct review when Carter was announced, the rule of Carter should be applied to him.

The decision below is inconsistent with this Court's decisions -- whether the Carter decision is regarded as fully retroactive, or as applicable only to cases pending on direct review when the Carter decision was announced. A writ of certiorari should issue to review the disposition of the retroactivity issue by the Court of Criminal Appeals of Oklahoma.

CONCLUSION

For the reasons stated, the Petitioner requests that a writ of certiorari be granted.

Respectfully submitted,

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